Office-Supreme Court, U.S.
FILED
APR 2 1981
ALEXANDER L. STEVAS,
CLERK

80-1708

NO. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE DOW CHEMICAL COMPANY,
a Delaware corporation,
Petitioner,
vs.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and DOUGLAS M. COSTLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

R. L. DAVIS
Division Counsel
The Dow Chemical Company
Midland, Michigan 48640
(517) 636-4781
RICHARD FORD
WILLIAM C. POTTER, JR.
FISCHER, FRANKLIN, FORD,
SIMON & HOGG
1700 Guardian Building
Detroit, Michigan 48226
(313) 962-5210

Attorneys for Petitioner
The Dow Chemical Company

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

QUESTIONS PRESENTED FOR REVIEW

I.

DID CONGRESS, WHEN IT ENACTED THE 1977 CLEAN AIR ACT AMENDMENTS, INTEND TO PRECLUDE A STATE FROM PERMITTING A SOURCE TO OPERATE A SUPPLEMENTARY CONTROL SYSTEM (SCS) *ON AN INTERIM BASIS* TO MEET AMBIENT AIR QUALITY STANDARDS (AAQS) UNTIL IT FINAL MEANS OF CONTINUOUS CONTROL (WHICH HAD BEEN CONTRACTED FOR BEFORE ADOPTION OF THE CLEAN AIR ACT OF 1970) COULD BE PLACED IN OPERATION?

The Court of Appeals answered this question "yes."

Petitioner contends the answer is "no."

II.

DID THE COURT OF APPEALS ERR IN REFUSING TO REVIEW THE LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977 ON THE GROUND THAT THE RELEVANT STATUTORY PROVISIONS WERE "OBVIOUS AND UNAMBIGUOUS?"

Petitioner contends the answer is "Yes."

III.

DID THE COURT OF APPEALS ERR IN CONCLUDING THAT, EVEN THOUGH THE AMBIENT AIR QUALITY STANDARDS (AAQS) FOR SULFUR DIOXIDE WERE BEING MET, THE STATE OF MICHIGAN COULD NOT REVISE ITS STATE IMPLEMENTATION PLAN (SIP) TO ACCOMMODATE PETITIONER'S UNIQUE COMPLIANCE PROBLEMS BECAUSE OF THE PARTICULAR VOLUME OF SULFUR DIOXIDE BEING EMITTED BY PETITIONER?

Petitioner contends the Answer is "Yes."

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Opinion Below	2
Jurisdiction	2
Statutes and Regulations Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Big Rivers Electric Corporation, et al v. U.S. Environmental Protection Agency, 523 F. 2d 16 (6th Cir. 1975), *cert. denied* 425 U.S. 934 (1976) 6

The Bunker Hill Company v. U.S. Environmental Protection Agency, 572 F. 2d 1286 (9th Cir. 1977) 6

Kennecott Copper Corporation v. Train, 526 F. 2d 1149 (9th Cir. 1975), *cert. denied* 425 U.S. 935 (1976) 6

Kennecott Copper Corporation v. Train, 424 F. Supp. 1217 (D. Nev. 1976), *reversed on other grounds, sub. nom. Kennecott Copper Corporation v. Costle*, 572 F. 2d 1349 (9th Cir. 1978) 6

PRECEDING PAGE WAS BLANK

Page

Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 489 F. 2d 390 (5th Cir. 1974, *reversed in part on other grounds, sub. nom. Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975) 6

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 13

Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976) 7,8,9,10,12,13

Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975) 8,13,14,15,16,17

Union Electric Co. v. U.S. Environmental Protection Agency, 427 U.S. 246 (1976); *reh. denied* 429 U.S. 873 (1977) 8,15,16,17

United States v. Oregon, 366 U.S. 643 (1961) ... 13

Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 3

Statutes:

42 U.S.C. § 7407(d)(1)-(2) 2,5

42 U.S.C. § 7410(a)(1)-(3) 2,17

42 U.S.C. § 7423(a)-(b) 2,5,10

42 U.S.C. § 7501(2) 2,5

42 U.S.C. § 7602(k) 2,5,10

42 U.S.C. § 7602(m) 2,5

42 U.S.C. § 7607(b)(1) 2,5

Congressional Reference:

H.R. Rep. No. 294; 95th Cong. 1st Sess. (1977) .. 10, 11,12

NO. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE DOW CHEMICAL COMPANY,
a Delaware corporation,
Petitioner,
vs.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and DOUGLAS M. COSTLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner THE DOW CHEMICAL COMPANY (Dow) respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in these proceedings on December 9, 1980. Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc in a timely manner, which Petition was denied by the United States Court of Appeals for the Sixth Circuit on February 9, 1981.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. A copy of the opinion is contained in the Appendix annexed hereto. (App. 1)

JURISDICTION

The Judgment of the Court of Appeals was entered on December 9, 1980. (App. 35) Petitioner thereafter filed a Petition for Rehearing and Suggestion for Rehearing En Banc on December 23, 1980, which Petition was denied by the Court of Appeals on February 9, 1981. (App. 36) This petition for writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are specific provisions of the Clean Air Act of 1970 as amended by the Clean Air Act Amendments of 1977. The provisions involved are:

42 U.S.C. § 7407(d)(1)-(2)
42 U.S.C. § 7410(a) (1)-(3)
42 U.S.C. § 7423(a)-(b)
42 U.S.C. § 7501(2)
42 U.S.C. § 7602(k)
42 U.S.C. § 7602(m)
42 U.S.C. § 7607(b)(1)

Because of their length, these statutory provisions are set forth in the annexed Appendix. (App. 36-45)

STATEMENT OF THE CASE

This case involves the question of whether Congress, in enacting the Clean Air Act Amendments of 1977, intended to prohibit sources from using Supplementary Control Systems (SCS) on an *interim* basis to meet ambient air quality standards until their final means of compliance (statutorily mandated "continuous controls") could be placed in operation. The parties here agree that a source's *final* means of compliance with the provisions of the Clean Air Act must be "continuous controls." The issue which divides the parties is whether the Clean Air Act Amendments of 1977 were intended to bar *interim* use of a SCS by a source to meet ambient air quality standards until its final means of continuous control (delayed for reasons over which it had no control) could be placed in operation.

In 1967, Dow and Consumers Power Company entered into a contract for what was to become Dow's final "continuous" means of compliance with the requirements of the subsequently enacted Clean Air Act of 1970. This contract committed Dow to retire its old fossil fuel fired boilers, purchase steam and electricity from a nuclear plant to be constructed at Midland, Michigan and reimburse Consumers, as a portion of the steam rates ultimately to be charged, for in excess of $700 million in construction costs incurred by Consumers in building the nuclear plant at Midland, Michigan. The nuclear plant was originally scheduled to be completed in 1974 but various delays, completely beyond Dow's control, moved the start-up date to 1980, then 1982 and now 1984.[1]

---

[1] Some of the reasons for the delays are set out in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

In order to provide for an *interim* means of meeting the ambient air quality standards (AAQS) by 1975 (as required by the Clean Air Act of 1970) until the nuclear plant could be completed, Dow was authorized by the Michigan Air Pollution Control Commission (MAPCC), through a series of Consent Orders or variances (App. 46, 53, and 70), to operate a Supplementary Control System (SCS)[2] in lieu of constructing tall stacks or implementing other systems found to be either economically or technologically infeasible.[3] There is no dispute between the parties that, since implementation of Dow's SCS, the system has proven completely successful in attaining and maintaining the relevant AAQS in the Midland County area.

All the Consent Orders or variances [Consent Order 12-73-05 (App. 46), Consent Order No. 10-1977 (App. 53) and Consent Order No. 01-1979 (App. 70)] were submitted by the MAPCC to the U. S. Environmental Protection Agency (EPA) for its review and approval. Moreover, as required by the Clean Air Act

---

[2] Dow's SCS is a sophisticated computer-controlled system which uses 8 monitors to sample air quality and a computer model to predict air quality at 83 points in the Midland area. The system limits the rate of pollutant emissions during periods when meteorological conditions are such that violations of the AAQS will occur unless pollutant emissions are reduced. This is accomplished by shifting from the use of coal as a fuel to the use of oil or natural gas.

[3] Dow and the MAPCC agreed that it was economically infeasible, in view of Dow's contractual commitment to Consumers to reimburse it for the cost of building the nuclear power plant in Midland, Michigan, to require the expenditure of tens or hundreds of millions *more* to improve existing coal fired units or to build new coal fired units when these units would have to be abandoned when the nuclear plant became operational.

Amendments of 1977 [42 U.S.C. 7407(d)(1)], the MAPCC designated Midland County an "attainment" area for sulfur dioxide (App. 36-37; 44; 125-127) and submitted this designation to EPA on December 30, 1977. (App. 136-137) EPA thereafter took the position that, in enacting the Clean Air Act Amendments of 1977 [specifically 42 U.S.C. § 7423(a) and (b) and 42 U.S.C. § 7602(k) and (m)], Congress intended to bar *interim* use of a SCS by a source to meet the relevant AAQS until its continuous means of control could be placed in operation. It contended that Congress, in enacting the 1977 Clean Air Act Amendments, had mandated use of *continuous* controls in *all* circumstances. EPA thereafter redesignated Midland County as a "non-attainment" area with respect to sulfur dioxide emissions (See App. B — EPA non-attainment reg.) and formally rejected Dow's most recent Consent Order No. 01-1979 as a revision to the Michigan State Implementation Plan (SIP). (See App. B — EPA reg. rejecting SIP revision)[4] In taking this action, EPA conceded that the AAQS were being met but took the position that they were being met through operation of a system (the SCS) which it viewed as prohibited by the Clean Air Act Amendments of 1977.

Dow timely filed Petitions to Review with the United States Court of Appeals for the Sixth Circuit,[5] seeking

---

[4] With respect to Dow's earliest Consent Order 12-73-05, EPA acknowledged receiving it by letter dated July 10, 1974, stated that it was reviewing it, and would contact the MAPCC if further information was needed. (App. 52-53) It never thereafter contacted the MAPCC or Dow to voice any objection to the interim use of Dow's SCS. With respect to Consent Order No. 10-1977, EPA acknowledged its receipt in an exchange of letters with the MAPCC (App. 64, 65 and 67) and thereafter caused the MAPCC to refuse to pursue its efforts to have the Consent Order approved as a SIP revision. (App. 104)

[5] The Court of Appeals had jurisdiction over the Petitions to Review pursuant to 42 U.S.C. § 7607(b)(1). (App. 44-45)

review of EPA's redesignation of Midland County, Michigan as a "non-attainment" area (Docket Nos. 78-3139 and 78-3595) and its rejection of Dow's Consent Order No. 01-1979 as a SIP revision (Docket No. 80-3260). Dow argued that case law decided prior to the Clean Air Act Amendments of 1977 specifically authorized use of a SCS on an *interim* basis where continuous controls were either technologically or economically infeasible. [*Natural Resources Defense Council, Inc. v. U. S. Environmental Protection Agency*, 489 F. 2d 390 (5th Cir. 194), *reversed in part on other grounds, sub. nom. Train v. Natural Resources Defense Council, Inc.*, 421 U. S. 60 (1975); *Big Rivers Electric Corporation, et al v. U. S. Environmental Protection Agency*, 523 F. 2d 16 (6th Cir. 1975), *cert. denied* 425 U. S. 934 (1976); *Kennecott Copper Corporation v. Train*, 526 F. 2d 1149 (9th Cir. 1975), *cert. denied* 425 U. S. 935 (1976); *Kennecott Copper Corporation v. Train*, 424 F. Supp. 1217 (D. Nev. 1976), *reversed on other grounds, sub. nom. Kennecott Copper Corporation v. Costle*, 572 F. 2d 1349 (9th Cir. 1978); *The Bunker Hill Company v. U. S. Environmental Protection Agency*, 572 F. 2d 1286 (9th Cir. 1977)] Dow also argued that the legislative history of the Clean Air Act Amendments of 1977 contained comments indicating that Congress (a) was legislatively affirming the holdings of these cases in enacting the Clean Air Act Amendments of 1977; (b) was mandating use of continuous controls as a source's *final* means of compliance but (c) was continuing to authorize *interim* use of a SCS where a source's final means of continuous control had not yet been placed in operation for reasons over which it had no control.

The Court of Appeals, after hearing argument in the "non-attainment" case on June 16, 1980, consolidated the "non-attainment" case (Nos. 78-3139 and 78-3595) with

the "SIP revision rejection" case (No. 80-3260) since the central issue of the legality of *interim* use of Dow's SCS was common to both cases. The Court thereafter scheduled and heard reargument. (App. 34) On December 9, 1980, the Court of Appeals filed its opinion dismissing Dow's Petitions to Review in which it held that:

(a) even though ". . . some of the language relied upon by Dow does seem to conflict with what we believe to be the obvious and unambiguous language of the 1977 statutory provisions quoted above" (42 U.S.C. § 7602(k); 42 U.S.C. § 7423(a) and (b)), the Court could ignore the legislative history in construing the statutory provisions involved since the statutory provisions were ". . . themselves obvious and unambiguous." (App. 6)

(b) even though the ambient air quality standards for sulfur dioxide were being attained, the State of Michigan could not grant Dow the variance in question (Consent Order No. 01-1979) and revise its SIP because of the particular levels of sulfur dioxide then being emitted from Dow's stacks. (App. 6)

Dow filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, arguing, *inter alia*, that the Court's refusal to review the legislative history in construing the statute contravened this Court's ruling in *Train v. Colorado Public Interest Research Group, Inc.*, 426 U. S. 1 (1976). Dow also argued that the Court's holding that Dow's Consent Order No. 01-1979 (or variance) could not be approved as a SIP revision because of the volume of its sulfur dioxide emissions (at a time when the AAQS for sulfur dioxide were admittedly being attained) was contrary to the decisions

of this Court in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60 (1975) and *Union Electric Co. v. U.S. Environmental Protection Agency*, 427 U. S. 246 (1976); *reh. denied* 429 U. S. 873 (1977) which held that, so long as the relevant AAQS are being met, the *state* — not EPA or the courts — alone determines which sources may be granted variances and what volume of pollutants they may emit.

The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on February 9, 1981. (App. 36)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THIS COURT'S DECISION IN TRAIN V. COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., 426 U.S. 1 (1976)

In the consolidated Petitions to Review before the Court of Appeals, Dow argued that Congress, in enacting the Clean Air Act Amendments of 1977, had not intended to reverse then existing case law which held that Supplementary Control Systems (SCS) could be used on an *interim* basis to meet ambient air quality standards where continuous controls were either technologically or economically infeasible. Dow pointed to the legislative history which contained comments supportive of its position. The Court of Appeals, while noting that ". . . some of the language relied upon by Dow does seem to conflict with what we believe to be the obvious and

unambiguous language of the 1977 statutory provisions quoted above . . . ," (App. 6) concluded that it need not review the legislative history to resolve the apparent conflict since the statutory provisions before it were ". . . easily understandable and unambiguous." (App. 6)[6] In ignoring the legislative history as an aid in interpreting this very complicated statute, the Court erred. In *Train v. Colorado Public Interest Research Group, Inc.*, 426 U. S. 1 (1976), this Court reversed a Court of Appeals decision involving an interpretation of provisions of the Federal Water Pollution Control Act. There, the Court of Appeals ignored the legislative history of the Act because it found that the statute itself was ". . . plain and unambiguous" — although it did note that the legislative history was in conflict. This Court reversed, stating:

> "To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: 'When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' (citations omitted) In this case, as

---

[6] The Court cited *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) and *United States v. Oregon*, 366 U.S. 643 (1961) in support of its conclusion that it need not review the legislative history. However, neither of these cases involved a situation where the legislative history was in fact in conflict with the "easily understandable and unambiguous" statutory language. As noted above, *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976) is directly in point since it does deal with a situation where, as here, the legislative history conflicts with the meaning attributed to the statute by the Court.

we shall see, the legislative history sheds considerable light on the question before the Court." (426 U. S. at 9-10)

If the Court of Appeals here had considered the legislative history of the 1977 amendments as an aid in interpreting the statute itself, it would have noted that:

(i) In enacting 42 U.S.C. § 7602(k), § 7423(a) and § 7423(b), which call for continuous controls to meet ambient air quality standards, Congress was dealing with a source's *final* means of control and was not addressing the question of whether a SCS could be operated on an *interim* basis to meet AAQS until a source's final means of continuous controls could be implemented.

(ii) The House Report, after discussing eight objections to the use of tall stacks and SCS, stated as follows:

"*Testimony*. — For the foregoing reasons, both the Environmental Protection Agency and the Federal Energy Administration testified in 1975 that *the final means of compliance should be continuous emissions reduction and that intermittent controls and tall stacks should only be used as interim measures under limited circumstances.* (H. 156, 1181). The National Academy of Sciences has concurred. Similarly, the representative of the State and Territorial Air Pollution Program Administrators has testified as follows:

" 'Mr. Rogers. *Does STAPPA agree with intermittent controls or continuous controls for stationary sources?*

" 'Mr. Barden. *STAPPA passed a resolution advocating that intermittent controls be used only during the interim, while permanent controls are being installed. Continuous controls should be the method of permanent control.*' " (H. 631-2) (H. Rpt. at p. 91) .

(iii) Three Court of Appeals decisions (one from the Sixth Circuit) decided prior to the 1977 amendments held that a source's final means of compliance with AAQS must be continuous controls but that a state may authorize interim use of a SCS where continuous controls were either economically or technologically infeasible. As to the 1977 amendments' effect on these cases, the House Report said:

"The Committee proposal is intended to ratify the general thrust, if not the specific holdings, of the three U. S. courts of appeals which have considered the issue of the permissibility of intermittent controls, tall stacks, and other dispersion enhancement techniques. *NRDC v. EPA*, 489 F. 2d 390 (5th Cir. 1974); *Big Rivers Electric Corp. v. EPA*, 523 F. 2d 16 (6th Cir. 1975); *Kennecott Copper Corp. v. EPA*, 526 F. 2d 1149 (9th Cir. 1975), *cert. denied* in each case. (emphasis supplied)

* * *

"By defining the terms 'emission limitation,' 'emission standard,' and 'standard of performance,' the committee has made clear that constant or continuous means of reducing emissions must be used to meet these requirements. By the same token, intermittent or supplemental controls or other temporary, periodic, or limited systems of control

would not be permitted as a final means of compliance." (H. Rpt. No. 294 at pp. 91-92) (emphasis supplied)

Thus, when the statutory provisions relied upon by the Court of Appeals are read in light of the legislative history, it is clear that Congress intended to mandate continuous controls as the *final* means of compliance but did not preclude use of a SCS *on an interim basis* to meet AAQS until a source's final means of compliance could be brought on-line.

Thus, the action of the Court of Appeals, in refusing to review the legislative history as an aid to interpreting the statutory provisions before it, is in direct conflict with *Train v. Colorado Public Interest Research Group, Inc., supra*. As this Court noted in *Train, supra*:

> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " (426 U. S. at 10)

Yet the Court of Appeals here held that:

> *"It is, however, a cardinal rule of statutory interpretation that the courts do not turn to legislative history to shed light on the meaning of easily understandable and unambiguous statutory enactments.* See *Southeastern Community College v. Davis*, 442 U. S. 397 (1979); *United States v. Oregon*, 366 U. S. 643 (1961)." (emphasis supplied) (App. 6)

As noted *supra* at page 9, Petitioner does not believe that the cases cited by the Court of Appeals support the rule of statutory interpretation it announced and that

Train v. Colorado Public Interest Research Group, Inc., supra, is controlling (and contrary to the Court of Appeals' holding). If Petitioner is in error, then it is apparent that the pronouncements of this Court in *Train v. Colorado Public Interest Research Group, Inc., supra, Southeastern Community College v. Davis, supra,* and *United States v. Oregon, supra,* regarding the function of the federal courts and the sources available to them in construing "clear and unambiguous" federal statutory enactments are in conflict. By granting this Petition for Writ of Certiorari, this Court can finally put to rest the question of whether and when federal courts should resort to the legislative history of federal statutory enactments for guidance in construing legislative enactments found to be "clear and unambiguous." This issue is clearly one of great importance to the federal judicial system and merits this Court's consideration.

II.

THE DECISION OF THE COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THIS COURT'S DECISIONS IN TRAIN V. NATURAL RESOURCES DEFENSE COUNCIL, INC., 421 U. S. 60 (1975) AND UNION ELECTRIC CO. V. EPA, 427 U. S. 246 (1976)

This Court, in two cases which are regarded by the bench and bar as "seminal cases" involving the interpretation of the Clean Air Act of 1970, discussed the respective roles of the states and the federal government (EPA) in implementing the provisions of the Clean Air Act of 1970. With respect to the formulation of a state's SIP and its revisionary process, this Court held:

> "The agency (EPA) is plainly charged by the Act with the responsibility for setting the national

ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a) (2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. *The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a) (2),* and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c). *Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation. Train v. Natural Resources Defense Council, Inc.* (421 U. S. at 79-80) (emphasis supplied)

* * *

"The judgments which the Agency must make when passing on variances under § 110(a)(3) are whether the ambient air complies with national standards, and if so whether a proposed variance would cause a plan to fail to insure maintenance of those standards." (421 U. S. at 93) (emphasis supplied)

* * *

> *"Since a variance would normally implicate only the § 110(a)(2)(A) requirement that plans provide for attainment and maintenance of national ambient air standards, treatment as revisions would result in variances being readily approved in two situations:* first, where the variance does not defer compliance beyond the attainment date; and *second, where the national standards have been attained and the variance is not so great that a plan incorporating it could not insure their continued maintenance."* (421 U. S. at 77) (emphasis supplied)

Again, in *Union Electric Co. v. U.S. Environmental Protection Agency, supra,* this Court held:

> "Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. *So long as the national standards are met, the State may select whatever mix of control devices it desires, Train v. NRDC, supra,* at 79, 43 L Ed 2d 731, 95 S Ct 1470, *and industries with particular economic or technological problems may seek special treatment in the plan itself.* Cf. 40 CFR §§ 51.2(b), (d) (1975); S Rep No. 91-1196, p 36 (1970). *Moreover, if the industry is not exempted from, or accommodated by, the original plan, it may obtain a variance, as petitioner did in this case; and the variance, if granted after notice and a hearing, may be submitted to the EPA as a revision of the plan."* (427 U. S. at 266) (emphasis supplied)

Thus, so long as the relevant AAQS are being met, *the state* — not EPA or a court (on review of EPA action) —

determines which sources may be given variances and what volume of pollutants they may emit.

The Court of Appeals here held to the contrary. On a record where it was uncontested that the relevant AAQS were being met, the Court nonetheless ruled that the Michigan Air Pollution Control Commission could not grant Dow the variance at issue (Consent Order No. 01-1979) and thereafter revise its SIP. The Court so held, stating:

> " . . . Dow is now emitting from its aging power plants 39,809 tons of SO_2 per year. Due to dispersion among a number of stacks and to relatively low pollution from other sources in the same county, Dow's emissions have not caused Midland County monitors to show violations of the national air quality standards.
>
> * * *
>
> "This means, of course, that absent EPA's order, Dow's SO_2 pollutants will continue to damage the air and the environment both in Midland County and downwind therefrom until Consumer's [sic] nuclear plant comes on line." (App. 6)

However, as noted above, the emission of 39,809 tons of sulfur dioxide per year by Dow is no bar to approval of its SCS on an *interim* basis because the relevant AAQS were and are being met. By saying that a state may not authorize the emission of a given volume of sulfur dioxide when the relevant AAQS are being met, both EPA and the Court of Appeals arrogated to themselves a decision-making power specifically reserved by the Act to the state. *Train v. Natural Resources Defense Council, Inc., supra; Union Electric Co. v. U. S. Environmental Protection Agency, supra.*

Moreover, to the extent that the Court of Appeals looked to the possible impact of Dow's emissions somewhere "downwind" rather than directing its attention solely to the impact of Dow's emissions in the area of Midland County where Dow is located, such action was completely contrary to the provisions of the Clean Air Act as interpreted by this Court. In determining whether to approve a variance as a revision to a state SIP, this Court has expressly held that the Administrator is to determine whether or not the AAQS are being met *in the area where the source is located. Train v. Natural Resources Defense Council, Inc., supra; Union Electric Co. v. U. S. Environmental Protection Agency, supra.* The Act confers no authority on the Administrator (or a court) to reject a variance on the ground that the source's emissions, while not causing any violation of the AAQS in the area where the source is located, might cause unspecified "environmental damage"elsewhere in the country where the source's emissions may ultimately be carried.[7]

Unless this Court grants this Petition for Writ of Certiorari, the fundamental roles of EPA and the states under the Clean Air Act, as articulated in *Train v. Natural Resources Defense Council, Inc., supra,* and *Union Electric Co. v. U. S. Environmental Protection Agency, supra,* will be inalterably changed and the role reserved to the states irretrievably diminished. Moreover, the present requirements of the Clean Air Act which mandate that

---

[7] While 42 U.S.C. § 7410(a)(2)(E) provides that a SIP must contain provisions to insure that a source's emissions do not prevent attainment or maintenance of AAQS in another state, there was no evidence in the record before EPA or the Court of Appeals in this case that Dow's emissions were causing or contributing to a violation of AAQS in any other state.

the Administrator, in reviewing a SIP revision request, determine the impact of the source's emissions in the area where the source is located will be effectively abrogated and the Administrator will be empowered to reject state-granted variances on the ground that, while the AAQS are being met in the area of the source and while its emissions are not causing any violation of AAQS in another state, the source's emissions "may" cause unspecified "environmental damage" somewhere else in the country.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

R. L. DAVIS
Division Counsel
The Dow Chemical Company
Midland, Michigan 48640
(517) 636-4781

FISHER, FRANKLIN, FORD, SIMON
& HOGG
By: William C. Potter, Jr.
1700 Guardian Building
Detroit, Michigan 48226
(313) 962-3210

Attorneys for Petitioner
The Dow Chemical Company

DATED: March 31, 1981